

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Sprint PCS and AT&T)	WT Docket No. 01-316
File Petitions for Declaratory Ruling)	
On CMRS Access Charge Issues)	

REPLY COMMENTS OF NEXTEL COMMUNICATIONS, INC.

Nextel Communications, Inc. (“Nextel”), by its attorneys, hereby submits these reply comments in response to the above-captioned proceeding.¹ Because no commenter has shown that federal law precludes commercial mobile radio service (“CMRS”) carriers from collecting originating or terminating access charges from interexchange carriers (“IXCs”), the Federal Communications Commission (“Commission”) should promptly issue the requested declaratory ruling in favor of Sprint PCS.

In its decision the Commission should first confirm that CMRS carriers can, if they choose, collect access charges from IXCs. In reaching this conclusion, the Commission should remain cognizant that the mechanics of how a CMRS carrier collects interexchange access charges is an entirely separate issue from whether CMRS carriers have the right to collect access charges for the service they provide to interexchange carriers. Second, there is no need for the Commission in this proceeding to determine appropriate mechanisms for the collection of access payments from interexchange carriers to CMRS providers. Indeed, unless and until there is some demonstrated need for Commission action, no rules are necessary, nor should they be adopted in

¹ Sprint PCS and AT&T File Petitions for Declaratory Ruling On CMRS Access Charge Issues, *Public Notice*, DA 01-2618, WT Docket No. 01-316 (rel. Nov. 8, 2001).

this proceeding. Instead, the Commission should maintain its current flexible framework where CMRS carriers have the ability to bargain with interexchange carriers and reach mutually beneficial commercial arrangements that suit individual carriers' business needs.

I. COMMENTS SHOW THAT CMRS CARRIERS CAN REQUEST AND COLLECT ACCESS CHARGES FROM IXCS.

The comments definitively show that Sprint PCS has the legal right to recover access payments from AT&T. As numerous commenters point out, there is ample Commission precedent to support CMRS carriers who choose to collect access charges from IXCs for their use of CMRS networks to complete or originate interexchange calls. For example, in 1987, the Commission held that cellular carriers were entitled to collect their switching costs from other telecommunications carriers, including interexchange carriers, when they provided access to their network.² This concept was reaffirmed in 1989 when the Commission stated that cellular carriers are entitled to just and reasonable compensation for interstate access,³ and this point was reiterated in 1994 at the time of the Commission's CMRS detariffing policy. In 1996 yet again the Commission found that CMRS carriers should be allowed to recover access charges from IXCs.⁴ Even AT&T and the few interexchange carriers that commented on this issue cannot point to existing legal precedent precluding CMRS carriers from requesting and collecting access charges from IXCs.

Indeed, given that the law is squarely against them, the IXC commenters had no choice but to argue that the Commission should adopt their view of the "better" policy. AT&T,

² Salmon PCS Comments at 4; Verizon Wireless Comments at 3.

³ Salmon PCS Comments at 4.

⁴ Verizon Wireless Comments at 4.

Worldcom and Qwest, for example, urge the Commission to mandate bill and keep rather than allow CMRS carriers to collect access charges.⁵

As a policy matter, however, the opponents of CMRS access charges are incorrect in stating that bill and keep would be an appropriate compensation framework for CMRS-IXC termination. Simply put, there is no reciprocal traffic that CMRS providers and interexchange carriers exchange, as is the case with interconnected local telecommunications traffic. Where CMRS carriers perform a service for interexchange carriers of originating or terminating interexchange traffic, CMRS carriers plainly should have the ability to bargain with interexchange carriers to get something in return for this service. Sprint PCS has concluded that it wants an access payment and, given the service that has provided and continues to provide to AT&T's interexchange customers, this conclusion is not unreasonable.

Instead of using a bill and keep framework for CMRS-IXC traffic, as a matter of fairness, as Western Wireless points out, the Commission should endorse a compensation regime where CMRS carriers can ask that the cost-causer, in this instance AT&T, pay the bill.⁶ Nextel explained in its comments that where there are reciprocal responsibilities, a bill and keep default compensation scheme can effectively address unequal bargaining power between an incumbent local exchange carrier and a competitive carrier such as a CMRS provider.⁷ Here, however,

⁵ See, e.g., WorldCom Comments at 3; Qwest Comments at 3.

⁶ Western Wireless Comments at 2. As Sprint PCS points out in its Opposition, AT&T already charges its customers for termination access and, accordingly, under AT&T's theory, consumers would pay twice because both the calling party and the person being called would pay for call termination. See Sprint PCS Opposition at 7.

⁷ Nextel Comments at 4. See also Western Wireless Comments at 6-7.

there is no reciprocity in what each carrier provides to the other.⁸ Accordingly, as the CMRS *carrier* comments unanimously agree, bill and keep is not appropriate.

Nextel notes that the Cellular Telecommunications & Internet Association (“CTIA”), while supporting the right of CMRS carriers to collect access charges in the absence of an alternative regulatory regime, urges the Commission to adopt bill and keep for all traffic, both local and long distance.⁹ Nextel agrees that bill and keep is the preferable regulatory regime for local-to-local traffic where carriers, in fact, have reciprocal obligations and realize specific benefits by the mutual exchange of telecommunications traffic for termination. Nextel and every other CMRS *carrier* commenter, however, disagree that bill and keep is appropriate, as either a legal or policy matter, in cases where IXC traffic is presented to a CMRS carrier, because IXCs do not perform any termination function for CMRS carriers. In these instances, CMRS carriers should not be restricted in their ability to collect their costs for providing service. Instead, the Commission should allow CMRS carriers to recoup these costs in the manner they best see fit, including, if a CMRS carrier chooses, the collection of access charges from IXCs.

⁸ Several groups of Missouri, Kansas and Oklahoma telephone companies filed comments in support of Sprint PCS that attempt to draw a parallel between the dispute between Sprint PCS and AT&T and a dispute these rural incumbent local exchange carriers (“ILECs”) are having with CMRS providers. *See* Missouri Independent Telephone Company Group Comments/ Missouri Small Telephone Company Group Comments; Chouteau Telephone Company, *et al.*, Comments. In short, Missouri rural ILECs contend that CMRS carriers must pay access fees to rural ILECs for the cost of terminating CMRS calls. What the rural ILECs ignore, however, is that in cases of ILEC-CMRS call termination, reciprocity is appropriate because both carriers originate and terminate traffic. Bill and keep for that relationship would, therefore, be appropriate.

⁹ *See* CTIA Comments.

As CTIA notes, the Commission has instituted a rulemaking examining all forms of intercarrier compensation.¹⁰ It is in that proceeding, however, and not in the present one, where the Commission, if it determines there is a need to change the “calling party’s network pays” framework, will enunciate a new policy and rationale.¹¹ In response to a court referral which is the basis for this proceeding, the Commission should not attempt to embark on any new policy direction. There is no question, however, that there are strong policy justifications for CMRS carriers treating local and interexchange traffic differently.

II. CMRS CARRIERS SHOULD HAVE THE FLEXIBILITY TO COLLECT (OR NOT COLLECT) ACCESS FEES.

Federal law is plain: CMRS carriers can collect access fees from IXC. This is the threshold issue on which Sprint PCS – AT&T disagree, and there can be no question as to how the Commission should respond in its declaratory ruling.¹² Once the right of CMRS carriers to collect access fees is established, the Commission can next turn to the mechanics of how those fees can or should be collected. While many commenters propose specific mechanisms for CMRS carriers to use to collect access charges, they are jumping ahead to address a problem that has yet to be demonstrated. In Nextel’s experience, many interexchange carriers are willing to negotiate arrangements where access payments are waived in lieu of business arrangements favorable to the CMRS provider. Indeed, given that there is no history of CMRS abuse in this

¹⁰ See CTIA Comments at 6 (citing Developing a Unified Intercarrier Compensation Regime, *Notice of Proposed Rulemaking*, 16 FCC Rcd 9610 (2001)).

¹¹ It is questionable, however, whether the record in the Intercarrier Compensation docket is sufficient to support a mandate of bill and keep for anything other than local-to-local traffic.

¹² Nextel reiterates that whether a CMRS carrier chooses to collect access fees from an IXC is a voluntary issue and many CMRS carriers may, as has Nextel done, choose to structure their relationships with IXCs in a manner that does not include charges for access. That some carriers choose alternative arrangements does not, however, change the legal answer as to whether CMRS carriers *can* charge IXCs access fees.

area (nor could there be, given that CMRS carriers historically have not even tried to collect access fees from IXC's), Commission regulation of the compensation arrangements between IXC's and CMRS carriers now would be unwarranted. Rather than adopt any of the various "safe harbor" proposals presented,¹³ the Commission should take a wait and see approach instead of prejudging the need for regulatory intervention.¹⁴ In the meantime, CMRS carriers should be provided the flexibility to bargain with interexchange carriers to reach arrangements that meet each carrier's business needs and objectives. There is much to recommend this deregulatory, market-based approach.

Allowing CMRS carriers to develop their own access charge collection mechanisms or to bargain with interexchange carriers would not, contrary to AT&T's assertions, violate the rate regulation prohibitions of Section 332 of the Communications Act.¹⁵ In cases where there is any

¹³ See, e.g., CTIA Comments at 9; Verizon Comments at 11-15; Leaco Cellular Comments at 4; Cellular Mobile Systems of St. Cloud Comments at 4.

¹⁴ In the context of landline competitive access charges, for example, the Commission took a wait and see approach and waited over four years before intervening and establishing benchmarks for competitive local exchange carrier access rates. See, e.g., Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers, *Seventh Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 96-262, FCC 01-146 (rel. April 27, 2001). Nextel notes that even in that market where the Commission ultimately concluded that it had to intervene, the Commission still allowed competitive LECs to charge interexchange carriers for access and encouraged carriers to voluntarily negotiate compensation. *Id.* at ¶¶ 4-6.

¹⁵ AT&T Comments at 4-8. The Commission has found that state courts and regulatory bodies may not directly or indirectly determine whether a CMRS carrier rate is reasonable or attempt to set rates prospectively. See, e.g., Southwestern Bell Mobile Systems, Inc. Petition for a Declaratory Ruling Regarding the Just and Reasonable Nature of, and State Challenges to, Rates Charged by CMRS Providers when charging for Incoming Calls and Charging for Calls in Whole Minute Increments, *Memorandum Opinion and Order*, 14 FCC Rcd 19898 (2000); Wireless Consumers Alliance, Inc.: Petition for a Declaratory Ruling Concerning Whether the Provisions of the Communications Act of 1934, as amended, or the Jurisdiction of the Federal Communications Commission Thereunder, Serve to preempt State Courts from Awarding Monetary Relief Against Commercial Mobile Radio Service (CMRS) Providers (a) For Violating State Consumer Protection Laws Prohibiting False Advertising and Other Fraudulent Business

dispute, CMRS carriers would not be asking state courts to set their rates, but instead would be setting their access rates themselves, which is the essence of their right to be free of state rate regulation under the terms of Section 332. For those CMRS carriers that charge access, the courts would simply be enforcing Commission policy by allowing CMRS carriers to collect the fee they have announced.¹⁶

Similarly, contrary to Qwest's claims, Section 254(g) of the Communications Act would not prevent IXCs from passing through CMRS termination fees to IXC customers,¹⁷ they merely would have to consider the fees when setting their rates. Moreover, it is not apparent that interexchange carriers subtract access charges from the rates they charge their end user customers to terminate calls on CMRS networks. Thus, there is no Section 254(g) issue for the Commission to consider.

III. A DECLARATORY RULING SHOULD ISSUE IN FAVOR OF SPRINT PCS.

Legal precedent and public policy concerns dictate that the Commission issue a declaratory ruling in favor of Sprint PCS. No federal law prohibits CMRS carriers from collecting access fees from IXCs, if CMRS carriers determine in their business judgment that there is a reason to collect access charges. In addition, it is sound public policy for the Commission to endorse an IXC-CMRS compensation regime where the "calling party's network pays" compensation framework logically applies.

Practices, and/or (b) in the Context of Contractual Disputes and Tort Actions Adjudicated Under State Contract and Tort Laws, *Memorandum Opinion and Order*, 15 FCC Rcd 17021 (2000).

¹⁶ IXCs are not left without a remedy if they believe that a CMRS access fee is excessive or unreasonable. The IXC can use the Commission's Section 208 complaint process so that the Commission can review the fee in question.

¹⁷ Qwest Comments at 6-7.

Finally, the Commission should not rush to prejudge developments in interexchange carrier-CMRS carrier compensation. There is no history of any competitive problem in the CMRS market, including any record of CMRS carrier attempts to impose IXC access fees that are anything other than reasonable. Accordingly, the Commission can take swift action to confirm that CMRS carriers can collect access fees from IXCs. No further regulation or clarification is needed.

Respectfully submitted,

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